

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| 3873 BUFFALO ROAD, INC. | : | DETERMINATION |
| TOPPERS THEATER | : | DTA NO. 816665 |
| for Revision of a Determination or for Refund of Sales and | : | |
| Use Taxes under Articles 28 and 29 of the Tax Law for the | : | |
| Period December 1, 1994 through February 29, 1996. | : | |

Petitioner, 3873 Buffalo Road, Inc., Toppers Theater, 3873 Buffalo Road, Rochester, New York 14624, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1994 through February 29, 1996.

The Division of Taxation appearing by Terrence M. Boyle, Esq. (Andrew S. Haber, Esq., of counsel) brought a motion for summary determination pursuant to 20 NYCRR 3000.5 and 3000.9(b) on the grounds that petitioner failed to file a request for conciliation conference with the Bureau of Conciliation and Mediation Services or file a petition with the Division of Tax Appeals within 90 days of the issuance of the Notice of Determination. The Division of Taxation, together with its Notice of Motion, submitted the affidavit of Andrew S. Haber, Esq., with attachments, including the affidavits of Geraldine Mahon and James Baisley, in support of its motion. The Division of Taxation's motion was filed on February 26, 1999. Petitioner's response was submitted on April 6, 1999. Additional documents and comments were due from

the parties by July 30, 1999, which date began the 90-day period for issuance of this determination.

Upon review of the pleadings, and the affidavits and documents submitted in support of the motion of the Division of Taxation, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation has shown entitlement to a determination granting summary determination in its favor on the ground that the material facts presented show petitioners request for a conciliation conference with the Bureau of Conciliation and Medication Services was untimely.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) purportedly issued to petitioner, 3873 Buffalo Road, Inc., Toppers Theater, a Notice of Determination dated January 27, 1997, identified by Assessment ID L-013131225-3 and certified mail control number P 911 002 599, asserting additional sales and use tax due in the amount of \$12,333.60 plus interest and penalty of \$2,028.20 and \$4,259.91, respectively, for a total amount due of \$18,621.71 for the tax period February 28, 1995 through February 29, 1996. The Notice of Determination is addressed to “3873 Buffalo Road, Inc., Toppers Theater, 3873 Buffalo Rd, Rochester, NY,” and has been made a part of the record herein.

The Notice of Determination states that “The tax assessed has been estimated in accordance with provisions of section 1138 of the Tax Law and may be challenged through a hearing process by filing a request for a conciliation conference or a petition for a tax appeals hearing by 04/27/97.” The notice then states, in part, “[i]f we do not receive a response to this

notice by 04/27/97: This notice will become finally and irrevocably fixed and subject to collection action.”

2. The Division submitted a copy of correspondence dated April 7, 1998 from petitioner’s representative to a conciliation conferee stating, in part, that a Division supervisor had granted petitioner’s Request for Conciliation Conference concerning the assessment at issue herein, on or about January 22, 1998, but that no CMS number had been assigned to the case.

3. A Conciliation Order Dismissing Request, dated July 10, 1998 was issued by the Bureau of Conciliation and Mediation Services (“BCMS”), bearing the following explanation:

“The Tax Law requires that a request be filed within 90 Days from the date of the statutory notice. Since the notice was issued on January 27, 1998,¹ but the request was not mailed until April 8, 1998, or in excess of 90 days, the request is late filed.”

A timely petition was filed by petitioners with the Division of Tax Appeals in protest of the Order on July 29, 1998.

4. The Division submitted the affidavits of Geraldine Mahon, Principal Clerk of the Case and Resource Tracking System (hereinafter “CARTS”) Control Unit of the Division since 1989, whose duties include supervising the processing of notices of deficiency and determination prior to sending the notices to the Division's mechanical section for mailing, and James Baisley, Chief Mail Processing Clerk, Mail Processing Center of the Division since 1994, whose duties include supervising the staff responsible for the delivery of outgoing mail to the post office. These affidavits describe the general procedures for the preparation and mailing of the notice of determination, and describe how such procedures were followed in this case.

¹ The affidavit of Thomas Dwyer, the conferee who issued this conciliation order, was submitted as part of the record to explain that the Division’s records show the statutory notice was issued on January 27, 1997, rather than January 27, 1998, and that 1998 is a typographical error.

5. The general process for issuing and mailing notices of determination begins with the CARTS Control Unit's receiving a computer printout entitled "Assessments Receivable, Certified Record for Zip +4 Minimum Discount Mail," referred to as a Certified Mail Record ("CMR"), and the corresponding notices of determination. The CMR is printed approximately ten days prior to mailing to allow time for review and processing and, therefore, the date on the CMR usually has to be changed to coincide with the date the notices are mailed. The notices themselves, on the other hand, are printed with the anticipated date of mailing. A certified control number is assigned to each notice, recorded on the notice itself and listed on the CMR under the heading "CERTIFIED NO."

A Division employee places each notice in an envelope. Once the notices are placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Then a mail processing clerk checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. A random review of thirty or less pieces of certified mail is checked against the information on the CMR. At some point in this process an employee of the Mail Processing Center manually changes the date on the CMR (which reflects the date it was printed) to the date of delivery to the post office. An employee of the Mail Processing Center then delivers the envelopes and the CMR to one of the various branch offices of the United States Postal Service ("USPS") located in the Albany, New York area. A USPS employee affixes a postmark and initials or a signature to the CMR indicating receipt of the mail listed on the certified mail record and of the CMR itself. Mr. Baisley's affidavit indicates that the employee of the Mail Processing Center also requests the USPS to either write in the

number of pieces received at the post office in the space provided or, alternatively, to circle the number for the pieces listed to indicate that was the number of pieces received.

The Division does not in the normal course of business request return receipts. Therefore, the CMR is the Division's receipt for certified mail delivered to the post office. It is usually picked up from the post office the following day by an employee of the Mail Processing Center and returned to the CARTS Control Unit. In cases of multi-page CMRs, the pages are connected when delivered to the USPS and remain connected even after being delivered back to the CARTS Control Unit, unless the Principal Clerk of the unit requests that the pages be disconnected.

6. In support of its position that the procedures outlined in Finding of Fact “5”, were followed in this case, the Division has also submitted a copy of the CMR listing the notice at issue in this matter. The CMR consists of 36 pages with 11 entries on each page, with the exception of page 36 which bears one entry. It shows a printed date of “1/17/97” on each of the 36 pages. On page one the printed date has a line through it and above it is handwritten the date of “1-27-97.” There is a consecutive listing of 386 certified control numbers beginning with P 911 002 258 and ending with P 911 002 643.² There is a Postal Service postmark of January 27, 1997 on each page of the CMR. On the last page next to “TOTAL PIECES AND AMOUNTS LISTED” appears the printed number 386, which is circled. There is no amount next to “TOTAL PIECES RECEIVED AT POST OFFICE”. There is a USPS postmark of January 27, 1997 on the last page and a signature under the number 386.

²Although the “P 911” portion of the certified number is not a part of the copy of page 36 presented into the record, the existence of the P 911 on an original can be reasonably inferred from the remaining 35 pages of the CMR.

Petitioner's name is listed on page 32 of the CMR. The certified number listed for the notice sent to petitioners is P 911 002 599 which matches the certified number shown at the top of the correspondence which accompanied petitioner's notice. The notice number listed on the CMR for petitioner's notice is L 013131225 which matches the number appearing on the notice. The name and address of petitioner is listed next and also corresponds to the information set forth on petitioner's notice.³ There is a USPS postmark of January 27, 1997 on page 32 of the CMR.

Petitioner's representative's name is listed on page 31 of the CMR. The certified number listed for the notice sent to him is P 911 002 596 which matches the certified number shown at the top of the correspondence which accompanied the representative's copy of the notice. The notice number listed on the CMR for the representative's copy of petitioner's notice is L 013131225 which matches the number appearing on the notice. The name and address of petitioner's representative is listed next and also corresponds to the information set forth on petitioner's notice.⁴ There is a USPS postmark of January 27, 1997 on page 31 of the CMR.

7. Petitioner, by its president Joanne Pronti, and petitioner's representative both submitted affidavits stating in pertinent part that tax has been improperly assessed in this case and that neither of them received the notice which would have permitted them to timely request a conciliation conference. As a result, they argue that petitioner should be granted the right to have the merits of its case heard.

³Although the corporate name appears on the CMR, it differs slightly in that the name "Toppers Theater" does not also appear, as it does on the notice.

⁴ The representative's law firm name, Dibble & Miller, P.C., does not appear on the CMR, as it does on the notice. The remaining information, however, is the same.

8. The Division simply argues that petitioner did not meet its burden of proof to show that petitioner's protest of the notice of determination was timely.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6]).

In reviewing a motion for summary determination, an administrative law judge is constrained by the following guidelines:

The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006 [6]).

A party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.9[b][1]). Such a showing can be made by "tendering sufficient evidence to eliminate any material issue of fact from the case" (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881). In addition, the Court of Appeals has held:

One opposing a motion for summary determination must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Zuckerman v. City of New York, supra*).

B. It is the contention of the Division that it is entitled to summary determination in its favor because petitioners failed to file a timely request for a conciliation conference or petition for a tax appeals hearing. The laws addressing the issuance and mailing of notices of determination and the procedures to timely protest the same follow.

Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed, or if a return when filed is incorrect or insufficient. Pursuant to Tax Law § 1138(a)(1) such determination “shall finally and irrevocably fix the tax” unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference in BCMS. The time period for filing such a request is also 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for a conference within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

C. Tax Law § 1147(a)(1) provides that a Notice of Determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.” This section further provides that the mailing of such a notice “shall be presumptive evidence of the

receipt of the same by the person to whom addressed.” (*Id.*) The addresses to which the notice of determination was mailed is not in dispute.

D. When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the date and fact of mailing of the statutory notice (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered into the custody of the United States Postal Service (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). Where a notice is found to have been properly mailed, “a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*see, Matter of Katz, supra*).

The required proof of mailing is two-fold: first, there must be proof of the Division’s standard procedure for issuance of notices, provided by individuals with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question. The Division submitted the affidavits of Ms. Mahon and Mr. Baisley in support of its position that the notices of determination were issued to petitioner and its representative on January 27, 1997, and such affidavits contain sufficient proof to establish the standard procedure of the Division for issuing notices of determination (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). The affidavits show that, as each notice is generated, a certified control number is assigned to each. In the process, a certified mail record is generated which contains the name and address of the taxpayer to whom the notice was issued, the assessment number of the notice and the certified control number assigned to the notice.

Second, the Division established that the general issuance procedure was followed on January 27, 1997 in the generation and mailing of petitioner's notices dated that day. Specifically, the affidavits of Ms. Mahon and Mr. Baisley, together with the certified mail record, show the total number of pieces received by the USPS, and the postmarks on the CMR, in turn, show the date of mailing as January 27, 1997 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). It is observed that the CMR used by the Division contains most of the significant elements of Postal Service Form 3877, and serves the same purposes of establishing the Postal Service receipt of the items listed thereon. The Division is not required to produce employees who personally recall the mailing of each notice. Rather, evidence of the Division's standard mailing procedure corroborated by documentary evidence of actual mailing is sufficient. Finally, it is noted that the figure "386" on the last page of the January 27, 1997 CMR, signifying the total number of pieces of mail involved, has been circled and a Postal Service employee has signed in the vicinity of the figure. As in *Matter of Roland (supra)*, the Division's affiant (here Mr. Baisley) states that the circling of this figure indicates that this was the number of pieces of mail received by the USPS on January 27, 1997. In addition, and unlike the situation in *Roland*, the affiant here also states the basis of his knowledge for this proposition. That is, the Baisley affidavit states that the Division's Mail Processing Center specifically requested that postal employees indicate the total number of pieces received by the USPS by either circling the number or writing the number on the certified mail record. This additional fact provides the element found to be lacking in *Roland*. Accordingly, consistent with the reasoning in *Roland*, the Division has met its burden of proof on the question of actual mailing in this case as to the January 27, 1997 Notice of Determination.

Petitioner does not challenge the method of mailing of the notice of determination dated January 27, 1997. Furthermore, review of the petition filed in this matter indicates that petitioner does not dispute that the notice dated January 27, 1997 was issued to the company at its last known address. However, in this proceeding, petitioner and its representative claim to “have never received a NYS DTF Notice of Determination, or other notice, to allow a timely request for a Conciliation Conference, or an Appeal, to be filed in order to protest the assessment of certain sales taxes.” Although petitioner attempted to rebut the presumption that the notices in question were delivered or offered for delivery in the normal course of the mail by its statement of non-receipt, the proof of mailing and delivery submitted by the Division proves that proper mailing procedures were in fact followed in this case. Petitioner’s statement alone is not sufficient to rebut the established presumption of receipt. The Division has established that it mailed the notice to petitioner on January 27, 1997 at its last known address. Accordingly, petitioner was required to file its request for a conciliation conference with BCMS within 90 days of January 27, 1997, or no later than April 27, 1997. Since the request was not made until April 1998, it is time barred.

E. The only triable issue of fact raised was the non-receipt of the notice of determination by petitioner and its representative. Since the Division has sufficiently refuted such non-receipt by its proof, and petitioner has submitted nothing further, the issue is deemed resolved, and no longer a question of fact. Such result leaves this matter a proper one for summary determination.

F. The Division of Taxation’s motion for summary determination is granted as to Notice of Determination L-013131225-3, dated January 27, 1997, and the petition of 3873 Buffalo Road, Inc., Toppers Theater, is hereby dismissed.

DATED: Troy, New York
August 26, 1999

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE